JD–66–11
Harrisburg, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED WATER PENNSYLVANIA INC.

and

Cases 6-CA-37236
6-CA-37298

UTILITY WORKERS UNION OF
AMERICA, AFL–CIO

Janice Sauchin, Esq. for the General Counsel.
E. Johan Lubbe (Littler, Mendelson, P. C.)
New York, New York for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, ADMINISTRATIVE LAW JUDGE. This case was tried in Bloomsburg, Pennsylvania on August 15–16, 2011. The Utility Workers Union of America, AFL–CIO (the Union), filed a charge in Case 6–CA–37236 on February 17, 2011, and an amended charge on May 10, 2011.[1] The Acting General Counsel issued a complaint in Case 6–CA–37236 on May 31, 2011. On May 6, 2011, the Union filed a charge in Case 6–CA–37298, and an amended charge on June 23, 2011. On June 29, 2011, the Acting General Counsel issued a complaint in Case 6–CA–37298 and on the same date issued an order consolidating the cases. United Water Pennsylvania, Inc. (the Respondent) filed answers in both cases. On July 22, 2011, counsel for the Acting General Counsel notified the Respondent's counsel, by letter, of her intention to amend the complaint in Case 6–CA–37236 at hearing. As amended at the hearing,[2] the complaint alleges that the Respondent failed and refused to provide the Union with certain information that is necessary and relevant for it to properly perform its function as the collective-bargaining representative of the employees at the Respondent's Bloomsburg, Pennsylvania facility in violation of Section 8(a)(5) and (1) of the Act. The complaint in 6–CA–37298 alleges that from early April, 2011 until June 17, 2011 the Respondent withheld the 2010 annual bonuses of the employees in the Bloomsburg bargaining unit in violation of Section 8(a)(5), (3) and (1) of the Act. The complaint also alleges that the Respondent, through its supervisor Gerald Miller, violated Section 8(a)(1) by telling employees that the Respondent would withhold the 2010

[1] All dates are in 2011 unless otherwise indicated.

[2] The Acting General Counsel's motion to amend sought the withdrawal of 2 paragraphs in the complaint and the renumbering of the remaining allegations. I granted the motion and consequently will refer to specific complaint allegations by their new paragraph number.

annual bonuses of employees until the Union signed a successor collective-bargaining agreement with the Respondent.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel[4] and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Pennsylvania corporation with its headquarters in Harrisburg, Pennsylvania and service centers in various locations including Bloomsburg, Pennsylvania has been engaged in the delivery of potable water to consumers. Annually, the Respondent derives gross revenues in excess of $500,000 from the operation of its business and purchases and receives at its Harrisburg, Pennsylvania facility, goods valued in excess of $5000 directly from points outside the Commonwealth of Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent operates a water filtration plant in Bloomsburg Pennsylvania and supplies drinking water to city of Bloomsburg and the surrounding area through its pipeline distribution system. It also sells bulk water to commercial customers.

The Respondent and the Union have had a collective-bargaining relationship for approximately 15 years and have entered into a series of collective-bargaining agreements regarding the employees of the Bloomsburg facility, the most recent of which covered the period from January 1, 2008 to December 31, 2010. (GC Exh. 2.)[5]

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[3] On October 13, 2011, the Acting General Counsel filed a motion to reopen the record in the above-captioned case and consolidate this case with the complaint that issued in Case 6–CA–37331 on October 12, 2011. On October 14, 2011, I issued an order to show cause giving the Respondent until the close of business on October 20, 2011 to respond to the Acting General Counsel's motion. The Respondent did not file a response. On October 21, 2011, I issued an order denying the Acting General Counsel's motion.

[4] I grant the Acting General Counsel's unopposed motion to correct the transcript. Accordingly, the transcript is corrected as follows:

Page	line	change	to
8	9	remain	were made
10	14	grieving	meeting
12	6	debit	date
24	4	gaining	bargaining
73	16	transpractice	past practice
79	13	commended	commented

[5] The contract, at page 1, indicates that it is between the Respondent and the Utility Workers of America, AFL–CIO. However, both representatives of the Utility Workers of America, Local 516 and a national representative of the Utility Workers of America executed the contract and the cover page of the contract indicates that it is between the Respondent and Local 516. I find that since both the Utility

The contractual unit is composed of crew chiefs, employees in Utility A and Utility B classifications and plant operators, excluding supervisors, who are employed at the Bloomsburg facility (GC Exh. 2, articles 2 and 22). There are 8 employees in the unit.

The Respondent's director of labor relations is John Polk; Mindy Ohren is a human resource generalist; Kirby Pack is an area supervisor and Gerald Miller is the superintendent of operations at the Bloomsburg, facility. All are admitted supervisors within the meaning of the Act.

The Respondent's parent company, United Water Inc., operates water treatment and distribution facilities nationwide and its headquarters are located in Harrington Park, New Jersey. Both Ohren and Polk are employed by United Water. Polk's office is in the Harrington Park, New Jersey headquarters, while Ohren's office is located in United Water's facility in West Nyack, New York.

In addition to the Bloomsburg facility, the Respondent operates a facility in Harrisburg Pennsylvania. The Utility Workers of America and its Local 489 represent the approximately 40 employees at that facility. The Respondent also operates facilities in Mechanicsburg and Dallas, Pennsylvania, where the employees are not represented by a labor organization.

Negotiations for new collective-bargaining agreement for the bargaining unit at the Bloomsburg facility began in November 2010. At the beginning of negotiations Ohren served as the Respondent's chief negotiator. At the meeting held on December 28, 2010, Polk appeared at the negotiations for the first time and assumed the role as chief negotiator. Pack also attended the meetings and John Hollenbach, the Respondent's general manager attended some of the meetings. Bernard Labelle, a national representative of the Utility Workers of America, AFL–CIO, served as the Union's chief negotiator. Milton Gray, the president of Local 516 and Donald Camillochi, Local 516's vice president, also attended the meetings.

The contract then in effect between the parties covering the Bloomsburg unit provided that employees were covered by a pension plan (GC Exh. 2, article 19.6). According to Labelle's uncontroverted testimony, the Respondent's initial contract proposal was to "freeze the current employees in the defined benefit program", and that employees starting after January 1, 2011, would not be part of the pension plan (Tr. 53–54). Before long, the Respondent changed its proposal to retain the current employees in the existing pension plan but to offer employees hired after January 1, 2011, participation in a 401(k) plan.

The Union's initial contract proposal regarding wages provided for the following wage increases for each year of the 3-year term of its proposed collective-bargaining agreement: 3.25 percent; 3 percent, and 3 percent. According to Labelle's uncontradicted testimony, at one of the early meetings one of the Respondent's representatives stated that "nobody" was getting 3 percent or more in wages anymore.

Workers of America, AFL–CIO and its Local 516 are signatory to the agreement, I will refer to both entities as the Union, unless it is necessary to differentiate between the two.

The Information Requests

On December 17, 2010, Labelle sent a letter to Ohren (GC Exh. 9) requesting, in relevant part, the following:

> 1. Please provide the total dollar amount contributed by the Company to the Defined Benefit pension for the 8 Union employees at the Bloomsburg PA location for the years of 2008, 2009 and 2010.
>
> 3. Please provide the collective bargaining agreements with the UWUA that contained bargained wages of less than 3% for the years 2008, 2009, 2010 and 2011.

On December 23, 2010, Ohren sent an e-mail (GC Exh. 10) to Labelle in response. In answer to the first paragraph of the Union's request, she indicated:

> Here are the normal costs on a per capita basis:
> 2008-$19,269.92
> 2009-$20,390.72
> 2010-[to date only] $21,002.40

With respect to paragraph 3 of the Union's request Ohren replied:

> As a National representative of the Utility Workers Union of America, you should have access to all or bargaining agreements between United Water and the UWUA locals. I do not automatically have access to the agreements and it will take time to obtain same from the other human resource managers, some of whom may be on vacation at this time. I will search for the documents, but I cannot guarantee that I will be in a position to obtain the information this week. As you equally have access to information, our failure to provide you with the requested information will not be an acceptable reason to delay negotiations or to extend the expiration date of the current collective bargaining agreement.

Ohren testified that she is not knowledgeable with respect to retirement issues and had requested Katherine McGoldrick, who is employed in the compensation and benefits department of United Water to provide her with the requested information. When Ohren received the information from McGoldrick, Ohren inserted the amounts in her December 23 response. Ohren indicated at the hearing that she did not really understand what these amounts reflected (Tr. 128).

Labelle testified that the information he received in the Respondent's December 23 letter regarding item 1 of his December 17 request was not responsive to his request. According to Labelle, since the Respondent provided the information on a "per capita" basis, the information did not show "the exact amount of dollars that would have been spent on these 8 employees" (Tr. 55). Labelle further testified that the pension program may be self-sufficient and the information provided does not show what, if anything, the Respondent spent on the pension program over and above its return on the fund investments. (Tr. 55–56.)

During the negotiations that occurred in the last week of December, Polk stated, in support of the Respondent's position regarding its proposed change in its retirement program, that the stock market was "volatile"; that these were "tough economic times"; and that there was uncertainty regarding pension programs. Local 516 President Gray, who is also a current employee of the Respondent, credibly testified, without contradiction, that at the meeting held on December 31, 2010, Polk stated that the Respondent wanted to move to a 401(k) plan instead of a defined benefit plan because "defined pension plans were expensive and a high risk for the Company" (Tr. 30). Polk made it clear, however, that the Respondent was not claiming an inability to pay the Union's demands. (Tr. 64–65.)

According to Labelle's uncontroverted testimony, at a bargaining meeting held on January 5, 2011, the Respondent's representatives requested that the Union clarify its information request. In response to that request, at the meeting Labelle gave the Respondent a document (GC Exh. 12) which indicated, in relevant part:

> #1. For clarification the Union is requesting what actual dollars did the Company have to contribute over and above any plan investment returns for the eight (8) bargaining unit employees in Bloomsburg PA ?
>
> #3. For clarification-please provide the collective-bargaining agreements with UWUA that contain bargained wages less than 3% each year for the years 2008, 2009, 2010 and 2011.
>
> The information requested is in reference to statements made by the Company at the bargaining table concerning the pension, wages and direction of the Company on the issue of the Enhanced 401k. The requested information is relevant to the merits of the Company's position during these negotiations.

At the top of the document in Labelle's writing is a notation "Given to Mindy 11:45." On cross-examination Labelle acknowledged that the reference to 11:45 was 11:45 a.m. (Tr. 78–79).

According to Ohren, after the Respondent received the Union's January 5 request, Polk asked for further clarification of exactly what the Union was seeking in paragraph 1 of the request. (Tr. 111). Polk did not testify at the hearing. However, the notes that Ohren took at the meeting reflect that this portion of the meeting started at 3:45 p.m. Ohren's notes (R. Exh. 3) contain the following references "confused on what you're looking for" and "clearly articulate exactly what you are looking for". Ohren's notes also indicate "spoke to headquarters and we are all confused."[6] Since Ohren's notes corroborate her testimony on this point, I find that after the Respondent received the Union's January 5, 2011, written clarification, Polk still asked for yet further clarification. I credit Labelle's testimony, however, that he did not tell the Respondent's

[6] After receiving the Union's January 5 request, on that same date, Ohren spoke to three managers at United Water's headquarters. Ohren admitted that none of these individuals were knowledgeable about the contribution level and the investment return for the pension plan covering the Bloomsburg unit (Tr. 134). McGoldrick, the individual in United Water's benefits department who Ohren had dealt with regarding the Union's December 17, 2010 request for information was not on the call.

representatives that he would get back to them (Tr. 80) as it is not disputed by Ohren. (Tr. 136). The Union did not provide further clarification regarding its January 5, 2011 request.

In the bargaining meeting held on January 6, 2011,[7] Labelle handed Polk a letter (GC Exh. 13) requesting the following information:

> In order to represent the membership of UWUA Local 516 in the current contract negotiations the Union requests the Company to provide the following information as it pertains to the bargaining unit members:
>
> 1. Please provide the total cost of your proposed package with the Enhanced 401k included.
>
> 2. Please provide the total cost of the package which includes the current "Defined Pension Plan".
>
> 3. Please provide the total amount of savings for the Company when changing to the Company's proposed Enhanced 401(k) plan from the current Defined Pension Plan.

The Respondent did not reply to the Union's January 6, 2011, request for information at the meeting held on that date. At that meeting, however, the Respondent submitted to the Union a final offer which included a wage increase of 2.25 percent a year in a proposed three-year contract extending from January 1, 2011 to December 31, 2013. The proposal also included a $.30-an-hour rider that would be applied before the general wage increase. (R. Exh. 2.) The Union's response reflects that it was in agreement with the amounts set forth in the Respondent's proposal on wages (R. Exh. 1). Labelle's uncontradicted testimony establishes that the parties had not agreed on the issue of the retroactivity of any wage increase and consequently had not indicated that the issue of wages was the subject of a tentative agreement.[8] Importantly, the Respondent's final offer was rejected by the Bloomsburg unit employees and consequently the parties have not reached a final agreement on wages or any other terms of a new collective-bargaining agreement.

With respect to the Union's request for collective-bargaining agreements that contain wages of less than 3 percent, Ohren testified that after the Union's first request for such information on December 17, she attempted to contact other human resource managers and generalists employed by United Water throughout the country. She testified that she received some information, but not that much. The information she did receive did not reflect a collective-bargaining agreement with the Utility Workers with wages of less than 3 percent. (Tr. 107–108.) On January 5, 2011, after the Union renewed its request for the contracts, Ohren again tried to contact United Water human resource individuals she had not heard from. Ohren testified that by January 6 she had not spoken to everyone she wanted to speak to because some individuals had

[7] The letter and Labelle's handwritten notation at the top of the letter indicates the date of January 6, 2010. At the hearing, Labelle explained that the reference to 2010 was an inadvertent error.

[8] The practice of the parties was to indicate there was tentative agreement on an issue by placing the letters "TA" next to the issue.

not responded to her. Ohren further testified that she did not continue to search for contracts between United Water and the Utility Workers of America after January 6, 2011 because, after the meeting on that date, she "felt that the wage issue was off of the table." (Tr. 110).

Ohren replied to the Union's January 6, 2011 information request in a letter dated January 14, 2011, (GC Exh. 14) which indicated the following with respect to items 1 and 2:

> We decline to provide the requested information on the grounds because Local 516 is not entitled to this data, and it is not relevant to bargaining .

The letter, perhaps inadvertently, did not specifically respond to the Union's request for information requested in paragraph 3. The letter closed by indicating that if the Union disagreed with the Respondent's position it should articulate the basis by which it is entitled to such information and the relevance of the requested information to negotiations.

Since the Union had not received the information it was seeking, on February 8, 2011, Labelle sent Polk another letter again requesting the information contained in his January 6 letter. When the information was not received, the Union filed a charge in Case 6–CA–37236 on February 17, 2011.

Other than the information contained in his letters, there is no evidence that Labelle specifically indicated to the Respondent the reason he was requesting such information. At the hearing, however, Labelle testified that the Union requested this information in order to evaluate the Respondent's proposals and the statements made by Respondent's representative during bargaining. Labelle specifically referred to statements made by Polk indicating that the move to 401(k) plans was a trend across the country and that these were "tough economic times." As noted above, however, Polk denied that the Respondent was having economic difficulties. With regard to evaluating the Respondent's proposals, Labelle indicated that the Union sought the information to determine how far apart the parties' proposals were. (Tr. 63–64; 82–83)

As of the date of the hearing, the Union had not received any of the information that it sought in the written requests it had submitted to the Respondent.

Analysis

Paragraphs 10, 13, 16, and 19 of the complaint, as amended, allege that the Respondent violated Section 8(a)(5) and (1) since December 17, 2010, by failing to provide the Union with all collective-bargaining agreements between the Union and the Respondent that contained bargained wages of less than 3 percent for the years 2008–2011.

Paragraphs 11, 13, 16, and 19 allege that the Respondent violated Section 8(a)(5) and (1) since January 5, 2011, by failing to furnish the Union with the "actual dollars contributed by Respondent [to the defined benefit pension plan] for the bargaining unit at Respondent's facility" in Bloomsburg, Pennsylvania.

Paragraphs 12, 13, 16, and 19 allege that the Respondent violated Section 8(a)(5) and (1) since January 6, 2011, by failing to furnish the Union with the following information: (a) the

total cost of the Respondent's proposed package, including the enhanced 401(k) plan; and (b) the total cost of the Respondent's proposed package, including the defined benefit pension plan.

It is clearly established that an employer is obligated to provide the collective-bargaining representative of its employees, on request, with information that is necessary and relevant to the union's function as the collective-bargaining representative. This obligation exists not only for the purpose of contract negotiations but also for the purpose of administering a collective-bargaining agreement. Relevancy is determined by broad discovery type standard and it is necessary only to establish the probability that the information sought would be useful to the union in carrying out its statutory duties. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *NLRB v Truitt Mfg Co*., 351 U.S. 149 (1965); *North Star Steel Co*., 347 NLRB 1364, 1368 (2006); and *American Broadcasting Co*., 290 NLRB 86 (1988).

The Board has long held that information concerning unit employees' terms and conditions of employment, including wages and pension information, is deemed to be presumptively relevant to the union's duty to represent the employees. *Pavilion and Forrestal Nursing & Rehabilitation*, 346 NLRB 458, 463 (2006); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984); *Crane Co*., 244 NLRB 103, 111 (1979); *Cowles Communication Inc*., 172 NLRB 1909 (1968) and *Curtiss-Wright Corp., Wright Aeronautical Division*, 145 NLRB 152 (1963), enfd. 347 F.2d 61 (3d Cir. 1965).

With respect to requested information involving individuals who are not part of the bargaining unit, the union must show that the information is relevant and must offer more than mere suspicion in order to be entitled to the information. *Sheraton Hartford Hotel*, 289 NLRB 463–464 (1984). The Board has held in *Kraft Foods North America, Inc*. 355 NLRB 767, 769 (2010) and *Frito-Lay Inc*., 333 NLRB 1296 (2001) that this burden can be met when a union meets the discovery type standard established in *NLRB v. Acme Industrial Co*., supra, and establishes the "probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Acme Industrial Co*. at 437. Thus, the union's burden is "not an exceptionally heavy one." *Kraft Foods*, supra; *SBC Midwest*, 346 NLRB 62, 64 (2005).

The Union's Request for Other Collective-Bargaining Agreements.

The Union's request for other collective-bargaining agreements that contain wage increases of less than 3 percent a year for the period 2008–2011 obviously seeks information regarding employees who are not members of the bargaining unit. Consequently, the Union is obligated to establish that the information is relevant. I must also determine the scope of the Union's request, as it seeks information not only from the Respondent but also the Respondent's parent corporation, United Water Inc.

The Union's December 17 request was sent to Ohren, who, at that time was the Respondent's chief negotiator but, as noted above, is employed by the Respondent's parent corporation, United Water. In its brief, the Respondent acknowledges that it interpreted the Union's request for other contracts as broader than a request limited to just the Respondent (Respondent's brief, p. 13). According to her uncontroverted testimony, Ohren contacted United Water managers throughout the country in an attempt to obtain the requested information.

Ohren's actions were appropriate as the Board has indicated that an employer has an obligation to obtain relevant information from a parent corporation or related subsidiaries of the parent corporation. *Arch of West Virginia*, 304 NLRB 1089 (1991). Accordingly, I find that the Union's request sought information from the Respondent, the Respondent parent corporation, United Water, and related subsidiaries of United Water.

During the negotiations in the instant case, the Union initially requested a wage increase of 3.25 percent in the first year of an agreement. A representative of the Respondent indicated early in the negotiations that "nobody" was getting more than a 3 percent wage increase. There is no question that wages are a mandatory subject of bargaining as Section 8 (d) explicitly indicates so. The Union's proposal for a wage increase in excess of 3 percent coupled with the Respondent statements that "nobody" was getting more than a 3 percent wage increase is sufficient to meet the Union's burden of establishing that the requested information would be useful in bargaining. *Kraft Foods*, supra, at sl. op. p.3 and cases cited therein at fn. 6. Accordingly, I find the wage information that the Union was seeking regarding employees in other bargaining units represented by the Utility Workers of America was indeed relevant and that, under the circumstances of this case, the Respondent had an obligation to, and did, undertake a search for such documents from its parent corporation and related subsidiaries.

In its brief, the Respondent does not dispute the relevance of the request. Rather, it contends that it made a diligent search for such documents and that no such documents were discovered. Thus, according to the Respondent, there are no documents to be produced. The Respondent also contends on January 6, 2011, the parties reached an agreement in principle on wages which obviated the necessity of producing the requested information.

I do not agree with the Respondent's contention that it made a diligent search for such documents and established that the requested documents do not exist. Ohren testified that while the information she received from other human resource managers did not reveal any contracts that would be responsive to the Union's request by January 6, 2011, not all of the individuals who had knowledge of the existence of such contracts had contacted her by that date (Tr. 109). Ohren admitted that she made no further effort to obtain the requested information after January 6, 2011. Thus, the Respondent has not conclusively established that there are no records that are responsive to the Union's request.

I also do not agree with the Respondent's contention that the parties reached an agreement on wages on January 6, 2011, which made the Union's request for the contracts moot. In this regard, while the parties' proposals were in accord on the amount of the yearly percentage wage increase and the amounts of a yearly wage rider, the parties had not indicated that wages were the subject of a tentative agreement because the issue of retroactivity of the rate increase had not been resolved. Most importantly, the unit employees failed to ratify the Respondent's final offer which the Union had presented to them. Under these circumstances, the issue of wages is still an open issue and the Union's request is therefore of continued relevance to that issue.

I find the instant case to be distinguishable from *Glazers Wholesale Drug Co*., 211 NLRB 1063 (1974) and *Bloomsburg Craftsmen, Inc*., 276 NLRB 400, 45 (1985) which are relied on by the Respondent in support of its position. In both of these cases the Board held that the obligation

to provide relevant information can be made moot by subsequent events. As noted above, the issue of wages between the parties in the instant case is still an open issue and consequently the Respondent is obligated to provide any documents that satisfy the Union's information request. By failing to do so, the Respondent has violated Section 8(a)(5) and (1) of the Act.

The Union's January 5, 2011 Request for the "Actual Dollars" Above Any Plan Investment Returns that the Respondent Contributed to the Defined Pension Plan for the Bloomsburg Employees

At the meeting held on January 5, 2011, pursuant to the request of the Respondent's representatives, Labelle clarified his December 17, 2010 request for information regarding the amount of money the Respondent contributed to the pension plan for the employees in the Bloomsburg unit. At this meeting Labelle gave the Respondent's representatives a document indicating:

> For clarification the Union is requesting what actual dollars did the Company have to contribute over and above any plan investment returns for the eight (8) bargaining unit employees and Bloomsburg PA?

Even after receiving this explanation, Polk claimed that the Respondent was still confused by the request and asked for further explanation by the Union as to what documents it sought. The Union did not offer any further explanation of its request and the Respondent has never furnished any information responsive to the request to the Union.

Board law is clear that information directly related to wages and other terms and conditions of employment, such as pension and medical benefits of unit employees is presumptively relevant. *International Protective Services, Inc*. 339 NLRB 701, 704 (2003). In *Beyerl Chevrolet, Inc.* ,341 NLRB 710, 720–721 (1975) the employer failed to provide the union with requested information regarding the funding and assets of the employer's existing pension plan, or any proposed substitute, in violation of Section 8(a)(5) and (1) of the Act.

The administrative law judge, whose opinion was adopted by the Board, noted:

> Certainly knowledge as to the cash, investments, and possibly other equities of Respondent and/or its employees in the "pension fund" maintained by Respondent for its employees, was and is of vital importance to any representative seeking to bargain concerning the employees' wages and other terms and conditions of employment; indeed, it is difficult to understand how a bargaining representative could conduct negotiations without such information.
>
> Since pensions, life insurance and health and welfare benefits are mandatory subjects of bargaining, information concerning them-including actuarial data, must be furnished in collective-bargaining. (Footnote and internal citations omitted). Id at 720–721.

Based on the foregoing, I find the information sought in the instant case, which goes to the cost of providing the unit employees with a pension plan, is presumptively relevant. The

Respondent does not dispute the relevancy of the Union's request, but contends that the request for information was sufficiently vague, so that the Union's failure to provide yet further explanation to the Respondent regarding the request, privileges its failure to provide any information.

I do not agree with the Respondent's position that the Union's request for the amount of money, if any, above plan investment returns the Respondent contributes to the pension plan for the employees in the Bloomsburg unit is so vague that the Union was required to further delineate what it was seeking. On January 5, 2011, when the Respondent asked the Labelle to clarify the Union's initial December 17, 2010, request for information on this issue, he did so immediately, in writing. After receiving the January 5, 2011, request for information, the Respondent's representatives did not specifically tell Labelle exactly what they failed to understand regarding his request, but merely repeated that they were confused by it. While Ohren had a conference call with the managers at United Water's headquarters to discuss the Union's January 5 request, none of the individual she spoke to was knowledgeable regarding the details of the pension plan covering the Bloomsburg employees. I find it significant that McGoldrick, the individual who prepared the response to the Union's first information request regarding the pension plan, was not contacted regarding the Union's January 5, 2011 request. I find, under the circumstances, that the Respondent did not undertake a serious effort to understand what the Union was seeking. The language of the Union's January 5, request is sufficiently clear in my view so that the Respondent was required to either provide the requested information or, explain in detail exactly what it did not understand regarding the request.

In support of its position that the Union's request was so vague and ambiguous so as to privilege the Respondent's refusal to provide the requested information, the Respondent relies on *A.M.F. Bowling Co. Inc., v. NLRB,* 977 F.2d 141 (4th Cir. 1992) denying enf. 303 NLRB 167 (1991). In the first instance, the court's decision denied enforcement to the Board's order. It is well settled that it is the duty of an Administrative Law Judge to apply established Board precedent which the Supreme Court has not reversed, notwithstanding contrary decisions by the courts of appeals. *Los Angeles New Hospital*, 244 NLRB 960, 962, fn.4, enfd. 640 F.2d 1017 (9th Cir. 1981); Iowa Beef Packers, 144 NLRB 615, 616 (1963) enfd. in part 3331 F.2d 176 (8th Cir. 1964). In addition, I find the court's decision in *A.M.F. Bowling Co* to be distinguishable from the instant case. There, the employer sought substantial wage concessions from the union at its Lowville, New York facility. The employer had conducted a wage survey of its employees comparing their wages to those of other employees performing similar work. The union requested during negotiations that the employer provide documentation supporting its asserted need for concessions. The employer failed to provide any documents to support its position, asserting that it was not claiming in inability to pay wage increases. The Board found that the employer's failure to provide the wage survey violated Section 8(a)(5) and (1). 303 NLRB at 169–170. The court disagreed with the Board's conclusion and found that the union's general request for the employer to "open its books" was insufficient to put the employer on notice that the union sought the wage survey. 977 F.2d 146–147.

In the instant case, the Union's request was specific as to what sought from the Respondent. The Respondent cannot escape its obligation to provide relevant information merely by repeatedly claiming confusion about the request, without making a serious attempt to explain to the Union the basis for its asserted confusion. On the basis of the foregoing, I find that the

Respondent's failure to provide the information sought by the Union in its January 5, 2011 request violates Section 8(a)(5) and (1) of the Act.

The Union's January 6 and February 8, 2011 Request for Information Regarding the Cost of the Respondent's Proposals Including the 401(k) plan and the Defined Benefit Pension Plan

The Union's January 6 and February 8, 2011 requests for information sought, in relevant part, "the total cost of your proposed package with the Enhanced 401(k) included" and "the total cost of the package which includes the current Defined Pension Plan."

The Acting General Counsel contends that the Respondent premised its bargaining position on specific assertions and thus made the requested information relevant. According to this argument, the requested information would enable the Union to evaluate and verify the Respondent's assertions made during negotiations and to develop its own bargaining positions.

The Respondent contends that it is not required to provide the requested financial information as it has not claimed an inability to pay. In support of its argument, the Respondent relies principally on *Nielsen Lithographing, Co*., 305 NLRB 697, (1991), review denied 977 F.2d 1168 (7th Cir. 1992).

As noted above in *Beyerl Chevrolet,* supra, the Board held that information regarding the funding and assets of a pension plan covering a bargaining unit represented by a union is presumptively relevant and must be furnished upon request. The requests made by the Union on January 6 and February 8, 2011 go to a related, but somewhat different matters: (1) the total cost of the Respondent's proposal including the existing pension plan and (2) the total cost of the proposal including the 401(k) plan. Since the Union's requests seeks information regarding the cost of Respondent's proposal, I do not find it to be presumptively relevant as is it is broader than a request relating solely to the assets or funding of a pension plan or a proposed substitute. I find therefore that the Acting General Counsel has the burden to establish the relevancy of the requested information in the instant case. The Respondent correctly asserts that generally an employer is not obligated to provide its financial records to a union unless the employer has claimed an inability to pay the Union's demands. *Nelson Lithographing*, supra; *Burrus Transfer, Inc*. 307 NLRB 226, 228 (1992). In the instant case, there is no evidence that the Respondent claimed an inability to pay the Union's demands regarding the pension plan for the unit employees.

Importantly, however, at a bargaining meeting held on December 31, 2010, Polk stated that the Respondent wanted to move to a 401(k) plan instead of a defined benefit plan because pension plans were expensive and a high risk for the company. During the last week of December, 2010, Polk also made more general statements in support of the Respondent’s proposed changes in its retirement program such as the stock market was volatile, these were tough economic times and there was general uncertainty regarding pension programs.

The Union's January 6, 2011 request for information regarding the cost of the Respondent's proposal was made in direct response to the Respondent's assertion that the present defined benefit plan was a high cost item and was a risk to the Respondent. Under these circumstances, the information is relevant in that it would assist the Union in determining the

accuracy of the Respondent's proposals and assist the Union in formulating its own response. The Union does not seek to obtain information regarding the general financial condition of the employer, but rather is seeking specific information to evaluate the claims of the Respondent regarding the high cost of the defined benefit plan at issue. In essence, the Union seeks two items, the cost of the Respondent's proposal including the defined benefit plan and the cost of the proposal including a 401(k) plan. Thus, the Union's request in the instant case is far different from the union's request in *Nelson Lithographing*. There, the union sought projected balance sheets and income statements, financial statements for the 3 prior years, as well as tax returns for that period. It also sought any analyses of working capital and the expense reports of management personnel and owners.

I find the instant case to be distinguishable from *Nielsen Lithographing* and that it is akin to the situations presented in *Caldwell Mfg. Co*., 346 NLRB 1159 (2006) and *National Extrusion & Mfg. Co*., 357 NLRB No. 8 (2011). In *Caldwell*, the employer claimed its other plants were more competitive than the plant represented by the union and its production costs were lower at its other facilities. The employer, however, had not pled an inability to pay the union's demands. The union requested cost data for each of the employer's other plants and the methods the employer used to measure productivity. The employer refused to provide the requested information on the basis of relevancy. The Board found that by virtue of the claims the employer had made during bargaining, the information was relevant and the employer was obligated to provide it. In *National Extrusion* the employer sought significant wage and benefit concessions. The employer sought to justify its demand by asserting that it faced competition from Asia and that its production costs had increased while production had diminished. It did not, however, assert an inability to pay the union's demands. In response to the employer's claims, the union requested information regarding, inter alia, the employer's customers, outsourcing, pricing structure and market studies. However, the union did not seek information regarding balance sheets, revenue, profits or other general financial matters involving the employer. Rather, the union sought specific information related to the employer's assertion that it needed wage concessions in order to be competitive. Under these circumstances, the Board found that the union's request went to the employer's claimed lack of competitiveness and the union had a right to the information it sought in order to understand and evaluate the employer's contentions. Id. at sl. op. p.3.

In the instant case, the Union is seeking limited and specific information in order to assess the accuracy of the Respondent's assertions that its pension plan for the unit employees is expensive and is a risk to it. Certainly such information would be of use to the Union in determining an appropriate response to the Respondent's final offer made on January 6. Clearly under the principles set forth in *Caldwell* and *National Extrusion*, the Respondent was obligated to provide the Union with the information it requested on January 6 and again on February 8, 2011, regarding the total cost of the Respondent's proposal including the 401(k) plan and the total cost of the proposal including the current pension plan. By failing to do so the Respondent violated Section 8(a)(5) and (1) of the Act.

The Delay in Distributing the Annual Bonus to the Bloomsburg Bargaining Unit Employees

Facts

In June 2007, the Respondent formalized its program to provide an annual bonus to "nonexempt and union personnel" (GC Exh. 15) by issuing a document explaining the provisions of the program. The plan document indicates that its "interpretation and application" is "at the sole discretion" of the Respondent. The Respondent's represented employees at the Bloomsburg and Harrisburg Pennsylvania bargaining units together with the unrepresented employees in Mechanicsburg and Dallas, Pennsylvania are all included in the same "business unit" for bonus purposes and have historically received the same percentage amount of a bonus.

The plan document establishes that the amount of the bonus is a percentage of an individual employee's gross earnings. The amount of the bonus is dependent on the joint performance of the employees of the 4 locations noted above with respect to achieving goals regarding profitability, safety and customer service. The bonus historically has been about 2 percent of an employee's gross earnings, although safety violations, injuries and the failure to attain other goals can reduce the amount. As an example, from 2007 through 2011 the bonus paid to Peter Auten, a unit employee in Bloomsburg, varied from $673.21 to $1136.06. (GC Exh. 16)

According to the plan document, the bonus is based on the performance of the previous year and is paid in the first quarter of the following year. Each year from 2007 through 2011 the annual bonus was paid to eligible employees in March. In 2011 the employees in the Harrisburg bargaining unit and the unrepresented employees in Mechanicsburg and Dallas, Pennsylvania, received a bonus on April 21, 2011. The employees in the Bloomsburg unit did not receive a bonus at that time. In late April 2011 Bloomsburg unit employee Auten spoke to Philip Barley, the president of Utility Workers Local 489 and a unit employee of the Harrisburg facility, about whether the employees in Harrisburg had received the bonus. Barley indicated that the Harrisburg employees had received the bonus.

Auten testified that shortly afterward, at the end of April 2011, he spoke to his immediate supervisor at the Bloomsburg facility, Gerald Miller, in Miller's office. Auten asked Miller when the employees at Bloomsburg would receive their bonus. Miller replied that he did not know much about the bonus and it was not under his control but that John Hollenbach, the Respondent's general manager, had stated that when the contract was settled, the employees in Bloomsburg would receive their bonus (Tr. 43, 45).

Miller testified that when Auten asked him about when the bonus would be paid at Bloomsburg, Miller responded that he did not know anything about when the bonus would be paid but that Auten should ask Hollenbach to bring it up in negotiations. According to Miller, he also told Auten that "there is a possibility that the reason the bonuses are held back would be possibly that they're in negotiation" and that they would be brought up at the "table." (Tr. 95.)

To the extent their testimony conflicts, I credit Auten over Miller. Auten's testimony is clear, concise and consistent on both direct and cross-examination. His demeanor reflected certainty in his testimony. On the other hand, Miller's testimony is somewhat equivocal and his demeanor reflected uncertainty about exactly what was said in this conversation. I also note that in his testimony he admitted that a possible reason for the delay in paying the bonuses was that the parties were in negotiations for a new contract.

In late April 2011, Auten and Gray informed Labelle that the Bloomsburg employees had not received their bonus. On May 6, 2011, the Union filed an unfair labor practice charge in Case 6–CA–37298 alleging that the Respondent's failure to pay the bonus to the Bloomsburg unit employees violated Section 8(a)(5),(3) and (1).

The bonus was paid to the employees in the Bloomsburg unit on June 17, 2011. It is undisputed that the Union was never given notice of, or the reason for, the delay in granting the Bloomsburg unit employees their annual bonus.

John Hollenbach, is United Water's general manager for the Pennsylvania and Delaware operations. Hollenbach testified that the delay in paying the bonuses to the employees at the Harrisburg, Mechanicsburg and Dallas facilities from March to April 2011 was because of a change in the Respondent's accounting system. With respect to the Bloomsburg facility, Hollenbach testified that the initial delay from March to April was also because of the change in accounting procedures. After that, Hollenbach had further internal discussions in April and May 2011, with Ohren and Polk about the legal and contractual issues regarding the payment of the bonus at Bloomsburg. Hollenbach indicated that it was the first time a contract had not been in place at the time the bonus was to be paid and there was some uncertainty as to what course of action to take. According to Hollenbach there was never a decision not to pay the bonus "it was just a matter of when." (Tr. 156.) Hollenbach did not notify the Union regarding the delay in paying the bonus at Bloomsburg at the bargaining meeting he attended on May 9 or any other time. Hollenbach testified that he did not know who made the final decision to pay the bonus as he was not involved in those conversations (Tr. 162–163). He could not recall who first informed him that the bonuses would be paid to the Bloomsburg employees.

Analysis

The Acting General Counsel asserts that the annual bonus is an established condition of employment and that the Respondent's unilateral delay in granting the bonus from April 21, 2011, until June 17, 2011 to the Bloomsburg unit employees violated Section 8(a)(5) and (1). The Acting General Counsel further contends that by delaying the payment of the bonus because the parties were in negotiations regarding the Bloomsburg unit, while paying the bonus to the employees at the Mechanicsburg, Dallas and Harrisburg facilities, the Respondent violated Section 8(a)(3) and (1). In this regard, the Acting General Counsel contends that by withholding an established benefit from the Bloomsburg unit employees while granting the benefit to other similarly situated employees, the Respondent engaged in conduct that is "inherently destructive" of the Section 7 rights of the Bloomsburg employees within the meaning of *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26 (1967).

The Respondent contends that the delay in paying the bonus to the Bloomsburg employees was in order to "clarify its legal obligation" when paying a bonus that came due, for the first time, when no collective-bargaining agreement was in place. The Respondent relies on *Pearl Recycle Center*, 237 NLRB 491 (1978) in support of its position.

The Respondent's policy of granting annual bonuses from 2007 to 2011 in March of each year is an established practice that became a term and condition of employment. In making this

finding I rely on the Board's decision in *Lafayette Grinding Corp.,* 337 NLRB 832 (2002). There, the employer made monthly payments to the union's health and welfare fund for a 3-year period even though it had not executed a successor collective-bargaining agreement covering that period. The Board found that the employer's cessation of the payments, without notice to the union, violated Section 8(a)(5) and (1). In so finding, the Board noted:

> As an established practice, the fund contributions became an implied term and condition of employment based on a mutual agreement of the parties. *Keystone Consolidated Industries v. NLRB*, 41 F. 3d 746, 749 (D.C. Cir. 1994), citing *Riverside Cement Co.*, 296 NLRB 840, 841 (1989) ("it is well settled that a practice not included in a written contract can become an implied term and condition of employment by mutual consent of the parties."). Any unilateral change in an implied term or condition of employment violates Section 8 (a) (5) and (1) of the Act. (Further citations omitted) Id. at 832.

In the instant case, the fact that the Respondent retained discretion as to the amount of the bonus does not diminish its standing as a term and condition of employment that is subject to a requirement that changes to it are subject to bargaining under *NLRB v. Katz,* 369 U.S. 736, 747 (1962). In this regard, in *Daily News of Los Angeles*, 315 NLRB 1236 (1994) enfd. 73 F. 3d 46 (D.C. Cir. 1996) the Board found that the employer's merit wage increase program was a term and condition of employment that was subject to a bargaining obligation, even though the employer retained discretion in setting the amount of the raises. In *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1973), the Board indicated that an employer is required to maintain the general outline of a merit wage increase program but that the implementation of the program regarding the timing or amounts of the increase are matters as to which the bargaining agent is entitled to be consulted.

In the instant case, since the annual bonus was an established term and condition of employment, the Respondent was not privileged to unilaterally delay its payment without giving notice and an opportunity to bargain to the Union. After the bonus was paid to the employees in Mechanicsburg, Dallas and Harrisburg on April 21, 2011, Hollenbach testified in a vague manner regarding "uncertainty" about the legal issues surrounding the payment of the bonus at Bloomsburg. He stated that in April and May he had discussions with Ohren and Polk regarding the payment of the bonus, but it is undisputed that the Union was never given notice that the Respondent had decided to delay the payment of the bonus at Bloomsburg. While Hollenbach was equivocal regarding the reason for delay in payment to the Bloomsburg employees, the credited testimony of Auten establishes that, at sometime prior to the end of April, Hollenbach told Miller that the Bloomsburg employees would receive their bonus when the contract was settled. Without a clear and cogent reason offered by the Respondent for the delay, I find that the withholding of the April bonus was originally based on the desire to use the completion of contract negotiations as condition precedent to the payment of the bonus. After the charge in Case 6–CA–37298 was filed on May 6, 2011, I believe the Respondent concluded it was required to pay the bonus and finally did so on June 17, 2011. I find that the unilateral withholding of the April 2011 bonus constituted a unilateral change in terms and conditions of employment and violated Section 8(a)(5) and (1) of the act. *United Aircraft Corporation,* 199 NLRB 658, 663 (1972) enfd. 490 F 2d. 1105 (2d Cir. 1973).

I do not agree with the Respondent's position that the Board's decision in *Pearl Recycle Center*, 237 NLRB 491 (1978) privileges its position. In that case, the employer had an annual practice of granting annual pay increases, which, at times, had been retroactive. On June 8, 1977, the employer made a final decision to a grant wage increase and the appropriate implementation form was executed on June 13, 1977. On June 15, 1977, the union filed a petition for an election. On June 27, 1977 the employer announced a wage increase retroactive to June 1, in a carefully worded statement explaining the reason for granting the pay increase and disavowing any association between the wage increase and the election. In finding that the employer's conduct did not violate Section 8(a)(1), the Board emphasized that, under the circumstances, the wage increase was not announced in order to discourage union activity. The Board also acknowledged that a certain amount of delay was involved in consulting counsel and drafting the announcement explaining the granting of the increase.

In the instant case, Hollenbach averted to certain "legal" issues regarding the payment of the bonus to the Bloomsburg employees, but there is no evidence regarding specifically what the Respondent's concerns were and the reason it took 2 months before the bonus was paid at Bloomsburg. As noted above, the Respondent gave no explanation to the Union or to the Bloomsburg employees as to the reason for the delay. Accordingly, I find that *Pearl Recycling* is distinguishable from the instant case.

With respect to whether the delay in granting the bonus also violated Section 8(a)(3) and (1), as I have found above, the annual bonus is an established condition of employment for the unrepresented employees at Mechanicsburg and Dallas and the represented employees in Harrisburg and Bloomsburg. In *Arc Bridges, Inc.,* 355 NLRB No. 199 (2010) the Board indicated:

> [W]here an employer withholds from its represented employees an *existing* (emphasis in the original) benefit (i.e., an established condition of employment), the proper analytical framework is found in *NLRB v. Great Dane Trailers, Inc.* 388 U.S. 26 (1967). In those circumstances the Board will find that the unilateral withholding of an established condition of employment from only the represented employees is "inherently destructive" of their section 7 rights even absent proof of antiunion motivation. Id at sl. op p. 2.

The Board also noted in *Arc Bridges* at fn. 2:

> No proof of antiunion motivation is necessary because inherently destructive conduct "carries with it unavoidable consequences which the employer not only foresaw but which he must have intended and thus bears its own indicia of intent." *Great Dane Trailers*, supra, at 33 (internal quotations and citation omitted).

In *United Aircraft*, supra, the employer denied a scheduled wage increase to newly represented employees and a management official admitted that it did so because the employer was in negotiations with the union. Applying *Great Dane Trailers*, the Board found that because the wage increase was an established condition of employment, denying it to represented employees while granting it to unrepresented employees was "inherently destructive" of statutory

rights, even absent proof of antiunion motivation. Accordingly, the Board found the employer's conduct violated Section 8(a)(3) and (1). 199 NLRB at 662.

In *Eastern Maine Medical Center*, 253 NLRB 224 (1980) enfd. 658 F.2d 1 (1st Cir. 1981) the employer had granted across-the-board wage increases to employees for the previous 8 years. In 1976 the employer granted the increase to all of its employees except the unit employees represented by the union. The employer's director conceded that the represented employees did not receive the increase because the employer was negotiating with the union at the time. As in *United Aircraft*, the Board found that the employer's conduct was inherently destructive of important employee rights and concluded that it violated Section 8(a)(3) and (1).

In *Arc Bridges*, the employer had a practice of granting wage increases when finances permitted for all of its employees, including those represented by the union. In 2007, however, the employer withheld the increase from the represented employees and admitted it had done so because it was in negotiations with the union. Id. at sl. op. p. 4. Consequently, the Board found that the employer's conduct was inherently destructive of employee rights and violated Section 8 (a)(3) and (1).

Applying these principles to the instant case, I find that the Respondent's delay in paying the annual bonus to Bloomsburg unit employees is attributable to the fact that the Respondent was in negotiations with the Union regarding that unit. Although the Respondent did not admit this was so, I draw such a conclusion based on the record as a whole. Other than Hollenbach's oblique testimony regarding the "contractual and legal issues" that Respondent was considering regarding the payment of the bonus during April and May 2011, there is no clear reason contained in the record as to why the bonus was delayed for 2 months. Hollenbach testified that he did not know what the "triggering" event was that caused the Respondent to finally pay the bonus to the Bloomsburg employees and he also did not know who made the decision to pay it (Tr. 162). What is clear is Auten's credited testimony that Miller told him that Hollenbach stated in April that the bonus would be paid when the contract was settled.[9] Thus, by delaying the established benefit of the annual bonus to its Bloomsburg employees because they were in negotiations, the Respondent engaged in conduct that is inherently destructive of employee rights and violated Section 8(a)(3) and (1). In so finding, I have considered the fact that the Respondent

[9] In its brief, the Respondent contends that even if I credit Auten, I should not attribute Miller's statement to the Respondent. In support of its position, the Respondent relies on *Marshall Durbin Poultry Co.v. NLRB*, 39 F. 3d 1312 (5th Cir. 1994). denying enforcement in relevant part, 310 NLRB 68 (1993). In that case the court found that a statement by a mid-level supervisor (Gaines) that it was "thanks to the union" that employees did not get a raise, did not, in the context of the entire record, constitute substantial evidence that the employer delayed a scheduled wage increase because of the union. Id at 1323. In the first instance the Board did rely on, inter alia, Gaines' statement in finding that the employer delayed granting a wage increase in violation of Section 8(a)(3) and (1). As noted previously, I am bound to apply Board precedent unless and until it is reversed by the Supreme Court. Los Angeles New Hospital, 244 NLRB 960, 962, fn. 4, enfd. 640 F. 2d 1017 (9th Cir. 1981); Iowa Beef Packers, 144 NLRB 615, 616 (1963) enfd. in part 331 F. 2d. 176 (8th Cir. 1964). I also note that in the instant case Miller repeated to Auten what Hollenbach had said and Hollenbach is a high management official who was involved in the discussions regarding the delay in the bonus. Accordingly, the instant case is factually distinguishable from *Marshall Durbin Poultry* where there was no evidence that Gaines was reporting a statement made by a high level management official.

paid the bonus on April 21, 2011, to the represented employees in Harrisburg at the same time it paid the unrepresented employees in Harrisburg and Dallas. Unlike the Bloomsburg employees, the represented employees at the Harrisburg facility were not engaged in negotiations at the time the bonus was paid. As I have found above, the delay at Bloomsburg is attributable to the fact that the parties were engaged in negotiations. Thus, the payment of the bonus to the employees at Harrisburg does not diminish the inherently destructive nature of its conduct at Bloomsburg.

The Alleged Violation of Section 8(a)(1) by Miller

Based on the credibility resolutions set forth above, I find that at the end of April 2011, when Auten asked Miller when the Bloomsburg employees would receive their bonuses, Miller replied that he did not know much about the bonus and it was not under his control, but that Hollenbach had stated that when the contract was settled, the employees in Bloomsburg would receive their bonus.

In *Jensen Enterprises*, 339 NLRB 877 (2003) the Board found that the statement by the employer's agent that wages would be frozen until a collective-bargaining agreement is signed violated Section 8(a)(1) when the employer had a history of granting periodic wage increases. The Board concluded :

> Such an announcement suggests to employees that the employer intends to unilaterally take away benefits and require the union to negotiate get them back. Id at 877

In *DHL Express, Inc*., 355 NLRB No. 224 (2010) at sl. op. pgs. 1–2 the Board found that the employer violated Section 8(a)(1) when a supervisor told employees that if a scheduled wage increase came up and the parties were in contract negotiations, the wage increase would be frozen during that period of time. Applying those principles to the instant case, Miller's statement that the Bloomsburg employees would not receive their bonus until the contract was settled violated Section 8(a) (1) of the Act.

CONCLUSIONS OF LAW

1. The Union is, and at all material times, was the bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time crew chiefs, employees in Utility A and Utility B classifications and plant operators employed by the Employer at its facility located in Bloomsburg, Pennsylvania, but excluding all office clerical employees, professional employees, and all guards and supervisors as defined in the Act

2. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by:

(a) failing to provide the following relevant and necessary information to the

Union: the collective-bargaining agreements entered into by the Utility Workers Union of America, AFL-CIO and United Water Inc. and any of its subsidiaries, including the Respondent, that contain wage increases of less than 3 percent for the years 2008, 2009, 2010 and 2011; the actual dollars the Respondent had to contribute over and above any plan investment returns for the bargaining unit employees at the Bloomsburg, Pennsylvania facility for the years 2008, 2009 and 2010; the total cost of the Respondent's proposal including the 401 (k) plan and the total cost of the Respondent's proposal including the current pension plan.

(b) implementing changes in the distribution of the annual performance bonus for its Bloomsburg, Pennsylvania employees without giving prior notice and an opportunity to bargain to the Union.

3. Respondent has engaged in an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act by withholding the annual performance bonus of employees at the Bloomsburg, Pennsylvania facility because of their union membership or support and because the Union had not agreed to a new collective-bargaining agreement.

4. The Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act by informing employees that their annual performance bonus would be withheld until the Union agreed to a new collective-bargaining agreement .

5. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

By withholding until June 17, 2011, the bonus that should have been paid to its employees in Bloomsburg, Pennsylvania on April 21, 2011, the Respondent deprived employees of the use of such a bonus. In order to make them whole, I order that the Respondent pay its employees interest on the amount to the bonus at the rate prescribed in *New Horizons for the Retarded, Inc*., 283 NLRB 1173 (1987); compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, United Water Pennsylvania Inc., Bloomsburg, Pennsylvania its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to provide relevant and necessary information to the Union regarding the following: the collective-bargaining agreements entered into by the Utility Workers of America, AFL–CIO and United Water Inc. and any of its subsidiaries, including the Respondent, that contain wage increases of less than 3 percent for the years 2008, 2009, 2010, and 2011; the actual dollars the Respondent had to contribute over and above any plan investment returns for the bargaining unit employees at the Bloomsburg, Pennsylvania facility for the years 2008, 2009, and 2010; and the total cost of the Respondent's bargaining proposal including the 401(k) plan and the total cost of the Respondent's bargaining proposal including the current pension plan.

(b) Implementing changes in the distribution of the annual performance bonus without giving prior notice and an opportunity to bargain to the Union.

(c) Withholding the annual performance bonus of employees at the Bloomsburg, Pennsylvania facility because of their union membership or support and because the Union had not agreed to a new collective-bargaining agreement.

(d) Informing employees that their annual performance bonuses would be withheld until the Union agreed to a new collective-bargaining agreement.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole all of the employees employed at the Bloomsburg facility whose annual bonuses were withheld from April 21, 2011, to June 17, 2011, by the payment of interest as set forth in the remedy section of the decision.

(b) Provide to the Union the following information: the collective-bargaining agreements entered into by the Utility Workers of America, AFL–CIO and United Water Inc. and any of its subsidiaries, including the Respondent, that contain a wage increases of less than 3 percent for the years 2008, 2009, 2010, and 2011; the actual dollars respondent had to contribute over and above any plan investment returns for the bargaining unit employees at the Bloomsburg, Pennsylvania facility for the years 2008, 2009, and 2010; and the total cost of the Respondent's bargaining proposal including the 401(k) plan and the total cost of the Respondent's proposal including the current pension plan.

(c) On request, bargain with the Union regarding any changes in the distribution of the annual performance bonus to the employees in the Bloomsburg, Pennsylvania bargaining unit.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, shall post at its facility in Bloomsburg, Pennsylvania copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 17, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 31, 2011.

_____
Mark Carissimi
Administrative Law Judge

11 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to provide relevant and necessary information to the Utility Workers of America, AFL–CIO and its Local 516 (the Union).

WE WILL NOT make changes in the distribution of your annual performance bonus without giving notice and an opportunity to bargain to the Union.

WE WILL NOT withhold your annual bonuses because of union membership or support or because the Union has not agreed to a new collective-bargaining agreement.

WE WILL NOT inform you that we will withhold your annual bonus until the Union signs a new collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL make employees whole by paying them interest on the amount of the bonus that was withheld from April 21, 2011 until June 17, 2011.

WE WILL, on request by the Union, bargain about any change in the implementation of your annual bonus.

WE WILL provide the Union with the following information it requested: the collective-bargaining agreements entered into by the Utility Workers of America, AFL–CIO and United Water Inc. and any of its subsidiaries, including United Water Pennsylvania Inc, that contain wage increases of less than 3 percent for the years 2008, 2009, 2010, and 2011; the actual dollars

we had to contribute over and above any plan investment returns for your pension plan for the years 2008, 2009, and 2010, and the total cost of our bargaining proposal including the 401(k) plan and the total cost of our proposal including the current pension plan.

United Water Pennsylvania Inc.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1000 Liberty Avenue, Federal Building, Room 904, Pittsburgh, PA 15222-4111

(412) 395-4400, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (412) 395-6899.